No. 78-189

In the Supreme Court of the United States

OCTOBER TERM, 1978

COUNCIL FOR EMPLOYMENT AND ECONOMIC ENERGY USE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C)[1] is reported at 575 F.2d 311. The opinion of the Fed-

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[1] Petitioner has not labelled or paginated its appendices. For convenience, the October 28, 1976 letter from the FCC (Pet. App. 1-3) will be cited as "Pet. App. A," the FCC's decision (Pet. App. 4-12) as "Pet. App. B" and the court of appeals' opinion (Pet. App. 13-19) as "Pet. App. C."

eral Communications Commission (Pet. App. B) is reported at 65 F.C.C. 2d 26.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1978. The petition for a writ of certiorari was filed on August 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was reasonable for the Federal Communications Commission to find that radio stations that provided free broadcast time to petitioner's political opponents did not abuse their discretion under the fairness doctrine.

STATEMENT OF THE CASE

Petitioner is a political committee organized to defeat a 1976 Massachusetts referendum.[2] As part of its campaign, petitioner purchased time on several radio stations to present its views opposing the referendum. These radio stations also provided time, without charge, to Fair Share, Inc. (FSI), an organization that supported the referendum. According to petitioner, the stations provided one free minute to Fair Share for each two minutes that petitioner purchased (Pet. App. C2).

[2] The referendum (which was defeated) would have required uniform electricity rates and thus limited the discount for volume purchases of electricity.

In October 1976, petitioner sought a declaratory ruling from the Commission that the stations' provision of free time for the presentation of opposing views was unreasonable and that the stations were not required to make free time available (J.A. 1-3).[3]

Emphasizing licensees' broad discretion in discharging their fairness doctrine obligations, the Commission's staff denied petitioner's request for a declaratory ruling and concluded that there was no basis for finding that the stations had abused their discretion in this instance (Pet. App. A1). Petitioner then asked the Commission to modify its staff's ruling in order "to make clear that broadcast stations are not required to provide free air time at a fixed ratio to financially-able advocates * * *" (J.A. 15).

The Commission agreed with petitioner that stations were not required to give free time to those who desired to present an opposing view:

> As a general rule, no particular person or group is entitled to appear on the stations' facilities since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any indvidual to express his [own] views.

(Pet. App. B5). It reiterated its view, however, that "[t]he choice of the appropriate spokesman and the means or combination of means to achieve fairness lies within the licensees' good faith discretion" (*ibid.*).

[3] References to "J.A." are to the Joint Appendix filed in the court of appeals.

Recognizing that the method the broadcasters in this case chose to meet their fairness doctrine obligations was not the only way they could have handled the matter, the Commission noted:

> The stations could have given, or possibly sold, time to other appropriate spokesmen to present a contrasting viewpoint on the ballot proposition, conceivably excluding FSI as a spokesman, and they could have, in the exercise of their discretion, used a variety of programming formats, including newscasts, news interviews, forums and debates to present contrasting viewpoints on this controversial issue of public importance.

(Pet. App. B6). Nevertheless, after considering the "totality of [the] circumstances," the Commission was unable to find that these licensees had acted unreasonably by affording petitioner's opponents free broadcast time to make their views known to Massachusetts voters (*ibid.*).

The court of appeals affirmed, noting that "[t]he Commission has done no more than rule that the donating of reply time is one acceptable means of meeting a licensee's obligations under the Communications Act * * *" (Pet. App. C7). The court held that there was "nothing unreasonable, unconstitutional or otherwise illegal" in the Commission's "hands-off" policy with respect to the manner in which a licensee chooses to fulfill its fairness doctrine obligations (*ibid.*). The court rejected as "patently absurd" petitioner's argument that the stations' provision of free time to petitioner's opponents constituted an unconstitutional quota that violated petitioner's First Amendment and equal protection rights. The court concluded:

> The Council's only complaint is that its opponents also had an opportunity to communicate their views. It would be a novel interpretation of the first amendment to find within its strictures a right not to be controverted in public political debate.

(Pet. App. C7).[4]

ARGUMENT

The decision of the court of appeals is correct, fully consistent with decisions of this Court and other courts of appeals and presents no issue warranting further review.

1. Petitioner's assertion (Pet. 17-20) that the Commission's ruling applying the fairness doctrine[5]

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[4] The court of appeals also concluded that petitioner had standing and that the controversy had not become moot.

[5] Under the FCC's fairness doctrine, broadcasters must present contrasting points of view on controversial issues of public importance. See generally, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *Fairness Report*, 48 F.C.C. 2d 1 (1974), aff'd, *NCCB* v. *FCC*, 567 F.2d 1095 (D.C. Cir. 1977). cert. denied, May 30, 1978 (No. 77-1331). Broadcasters have broad discretion to determine the content of their programming and how best to satisfy their obligations under the fairness doctrine. *See, e.g., Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 110-111, 125-126 (1973). Generally, a broadcaster will be able to satisfy its fairness doctrine obligations within its sponsored programming.

[Footnote continued on page 6]

denied it equal protection of the laws in violation of the Fifth Amendment is baseless. Petitioner does not present an arguable claim to which an equal protection analysis might be applied.[6] Petitioner's claim

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[5] [Continued]
However, the "Cullman Rule" holds that in certain circumstances, particularly when no paying spokesman is available, broadcasters may have to make time available, without charge, for presentation of the opposing viewpoint. See *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1973).

[6] This Court has delineated standards for testing claims of denial of equal protection. The initial inquiry is whether the government action complained of

> operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. * * * If not, the * * * scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1, 17 (1973). Presumably the classification of which petitioner complains resulted from broadcast stations' giving free time to its opponents after having charged it for broadcast time, although petitioner has made no representation that the stations refused to give it free time. The action of the stations is in itself private action, rather than governmental action. In any event, to the extent that governmental action is implicated, this case clearly does not involve a suspect classification. Compare, *e.g.*, *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). Moreover, as we demonstrate below, the Commission's decision in no way impinges upon petitioner's exercise of its First Amendment rights. The question, therefore, is whether the Commission's interpretation of the Communica-

rests on the inaccurate premise that the radio stations provided petitioner's opponents a "quota" of free time because the stations were compelled (or felt compelled) by the Commission to do so (Pet. 17-20). The Commission made it quite clear that the licensees were not required to give petitioner's opponents any quota of reply time—in fact were not required to give petitioner's opponents any time at all. See Pet. App. B6. This was consistent with long-standing Commission policy of affording licensees very broad discretion in deciding how to fulfill their responsibilities under the fairness doctrine.[7] Petitioner's assertion that the radio stations "felt that the Fairness

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tions Act and the fairness doctrine in these circumstances furthers a legitimate purpose and does not constitute invidious discrimination prohibited by the equal protection guarantees. This Court's decision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra*, 412 U.S. at 121-132, demonstrates that it was reasonable and appropriate for Congress and the Commission to conclude that the public interest in being fully and fairly informed and in minimizing government control over the content of broadcast discussion of public issues would best be served by reliance on the editorial discretion of the licensee. The Commission's ruling in the instant case reiterated that principle, and petitioner failed to demonstrate to the Commission that these stations' provision of free reply time constituted an abuse of that discretion.

[7] See, *e.g.*, *Applicability of the Fairness Doctrine*, 40 F.C.C. 598, 599 (1964); *Fairness Report*, 48 F.C.C. 2d 1, 33 (1974), aff'd, *NCCB* v. *FCC*, *supra*; *Green* v. *FCC*, 447 F.2d 323, 328-329 (D.C. Cir. 1971); *Democratic National Committee* v. *FCC*, 460 F.2d 891, 898-900, 904 (D.C. Cir. 1972).

Doctrine compelled" them to give a "quota" of free time to petitioner's opponents (Pet. 17) is unsupported by any evidence in the record; on the contrary, the only licensee which responded to petitioner's complaint denied that it had felt compelled to give free time to petitioner's opponents.[8] See J.A. 22.

2. Petitioner's First Amendment argument (Pet. 26-31)—that the Commission interfered with the free speech of petitioner and the public—is similarly without merit. To the extent that petitioner contends that its free speech rights were chilled by the Commission's action, its position is contrary to *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra*, 412 U.S. at 121-132, in which this Court held that neither the First Amendment nor

[8] A necessary component of petitioner's argument is that the action of the stations here constituted state action. See *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 461 (1952). Broadcasters' editorial judgments do not, however, constitute state action for purposes of the First Amendment. See, *e.g.*, *Kuczo* v. *Western Connecticut Broadcasting Co.*, 566 F.2d 384 (2d Cir. 1977); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950); *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F.2d 597, 601 (3d Cir. 1945); *Moro* v. *Telemundo, Inc.*, 387 F. Supp. 920 (D.P.R. 1974); *Smothers* v. *Columbia Broadcasting System, Inc.*, 351 F. Supp. 622 (C.D. Cal. 1972); *Post* v. *Payton*, 323 F. Supp. 799 (E.D. N.Y. 1971). See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra.* In any event, the court below found it unnecessary to reach that question, since, as we have shown, petitioner has made no colorable claim of a constitutional violation even if state action is involved.

the public interest standard of the Communications Act requires broadcast stations to make time available to any individual wishing to discuss his views on public issues. Indeed, a basic goal of the fairness doctrine since its inception has been to preserve "the right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee *or any individual member of the public* to broadcast his own particular views on any matter * * *." *Editorializing Report*, 13 F.C.C. 1246, 1249 (1949) (emphasis added). See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

Moreover, even if it is assumed that petitioner had a First Amendment right to present its views on broadcast stations, neither the stations nor the Commission in any way restricted petitioner's ability to do so. On the contrary, the stations in this instance sold petitioner as much time as it desired.[9] Thus, the court of appeals correctly held that any violation of petitioner's rights in this case could only be based on "a novel interpretation of the first amendment [that found] within its strictures a right not to be controverted in public political debate" (Pet. App. C7).

Petitioner's assertion that the public's First Amendment right to "receive access to social and political ideas" (Pet. 26) was "chilled" is frivolous. The

[9] Compare *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra* (no violation of the First Amendment where broadcast stations refuse to sell any time for editorial advertising).

broadcasters' actions here enhanced the public's "access" to debate on the merits of the referendum.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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